(2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

v. File No. 95-345

GUY JEROME URSERY,

Respondent.

---/

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Guy Jerome Ursery, opposes the petition for certiorari file by the United States of America with respect to the case of United States v Guy Jerome Ursery, 59 F 3d 568 (CA 6, 1995).

FACTUAL MATTERS

Respondent supplements the factual background with the following information:

1. Prior to filing a civil complaint for forfeiture, the United States obtained a Seizure Warrant for Ursery's property (Appendix A) This warrant was based on an Affidavit in Support of Seizure Warrant. (Appendix B) This document made no mention of distribution of a controlled substance. This affidavit outlined evidence that Respondent had been growing (manufacturing) marijuana. The Seizure Warrant was executed by United States Marshals on October 2, 1992, effectively seizing Respondent's real estate without a hearing.

2. The Complaint for Forfeiture alleges that the real estate was used to facilitate "unlawful processing and distribution" of marijuana and purported to incorporate the allegations in the Affidavit in Support of Seizure Warrant, supra. As indicated above, this affidavit contained no allegations of distribution. Moreover, no evidence of commercial distribution was presented at the trial. The only evidence relating to disposition of the marijuana at trial was to the effect that Respondent shared it with his friends and acquaintances without renumeration. (See 59 F 3d

568, 579, dissenting opinion of Judge Milburn.) There was no evidence that the Respondent used his residence to facilitate or commit the commercial distribution of marijuana. There was no evidence that the marijuana allegedly grown by the Respondent was shipped across state lines. The Presentence Investigation Report (Appendix C) contained no reference to marijuana distribution and none was alleged or considered as "relevant conduct" under the sentencing guidelines, U.S.S.G §1B1.3. The informant, Heather McPherson, whose disclosures resulted in both the forfeiture and the criminal prosecution claimed to be at the Ursery residence almost everyday during the period of 1990 - 1992 and never observed marijuana trafficking.

3. The primary law enforcement agency investigating this matter was the Michigan State Police. No federal agents were involved as witnesses at Respondent's trial. Federal agents were present when the search warrant issued by a state court magistrate was executed. Under the laws of the State of Michigan, Respondent could have been charged with manufacture of marijuana. Under MCLA 333.7401(2)(c) he would have faced a felony with a maximum punishment of four (4) years imprisonment and/or a fine of $2,000.00, instead of a penalty of 5 - 40 years imprisonment with a mandatory 5 year sentence under the federal statute. 21 USC 841(a)(1).

4. Respondent and his wife filed an Answer to the Complaint for Forfeiture, contesting, among other things, the allegations that marijuana was found growing on their real estate. In their

answer they referred to a certified survey and private investigator's report that indicated that plots where marijuana plants were seized were outside the boundaries of their property.

5. At all times relevant to this case, the government could have proceeded under the provisions of 21 USC 853, which provides for criminal forfeiture upon the Respondent's conviction for growing marijuana.

REASONS FOR DENYING CERTIORARI

Petitioner cites three reasons for granting certiorari, each of which will be analyzed below.

I.

The government argues that the Sixth Circuit erred in determining that the civil forfeiture in this case was punishment, attacking the claimed categorical approach employed in the resolution of this case. This argument centers on the legal standard and pays no attention to the actual facts of this case. As was the case in United States v Halper, 490 U.S. 435 (1989), the imposition of forfeiture of Ursery's real estate constituted an "overwhelmingly disproportionate" sanction. There was no evidence that Ursery purchased this property with the proceeds of illegal drug trafficking. There was no evidence of commercial trafficking. Ursery had worked for approximately 18 years for General Motors and earned a comfortable and honest living. (Appendix C, p 7) He and his wife had purchased the forfeited home and were obligated on a mortgage in the amount of $13,512.19. (Appendix C, p 8) The mortgage holder, NBD Bank, was a party to the civil forfeiture

matter. Ursery's financial condition did not suggest that he was an affluent drug dealer. His financial condition was consistent with his station in life and his legitimate employment.

Not only did Ursery have his home forfeited, he faced 5-40 years of imprisonment. The imposition of civil forfeiture in this case served no other purpose other than to impose further punishment. The proceeds from the liquidation of Respondent's residence could not have reimbursed the federal government for the expenses of its investigation as the investigation in this case was conducted by the Michigan State Police. The government presented no evidence regarding the cost of the investigation undertaken by state authorities.[1] There was no evidence that the residence was purchased with illegally gotten gain. The purposes of forfeiture were retributive and deterrent, not remedial, especially when viewed in light of the particularized facts in this case.

The trial judge commented on the disproportionate sentence at the time of a hearing on a request for bond pending appeal, indicating that:

> "...this is an extraordinary prosecution, because there was no Federal involvement until the State authorities brought it to the Federal authorities.
>
> And it's an unfortunate set of circumstances. But that's no business of mine. I deal with it from the indictment. And, thus far, the Supreme Court has not suggested that it represented any kind of misconduct for that to occur.

[1] Such a showing appears to be appropriate under Halper. The Court noted that where a defendant has previously sustained a criminal penalty and the civil penalty "bears no rational relation to the goal of compensating the government for its loss ... then defendant is entitled to an accounting of the governments damages and costs to determine if the penalty sought in fact constitutes double punishment". 104 L Ed 2d 487, 502.

> And there was little offense to the dignity to the United States of America in this offense.
>
> Furthermore, there was no evidence of trafficking,except a conclusion to be drawn from the quantity.
>
> And, five, taking the totality of the circumstances of the offense, the penalty as required under the sentencing guidelines is grossly disproportionate.
>
> When I put all those together, I have an uneasy feeling as to whether or not I can be assured -- say with any great satisfaction that this conviction will be confirmed at a higher level. So, therefore, I will grant the Defendant bond pending appeal." (Hearing on Motion of Bond Pending Appeal, 3-2-94, pp 3-4)

In short, the facts of this case make it more like Halper. There is no need to use the categorical approach attributed to the Sixth Circuit. An examination and analysis of this case on its facts justifies the conclusion that the forfeiture was punishment.[2]

Petitioner also argues that there is a conflict among the Circuit Court of Appeals with respect to the issue of whether forfeiture is punishment for purposes of the Double Jeopardy Clause. It should be noted that neither of the cases cited by the government are cases involving forfeiture under the statute at issue in this case. In United States v Morgan, 51 F 3d 1105 (CA 2, 1995) the court was considering the impact of a civil settlement agreement which included a restitution provision on the government's prosecution for the misconduct relating to a savings and loan operation which resulted in the civil settlement. Ignoring the label given to the restitution in the agreement, the court found that the $1.5 million was not punishment because it was

[2] The government could have avoided the problem created by the duplicitous proceedings in this case by combining the forfeiture case with the criminal case using criminal forfeiture proceedings under 21 USC 853.

designed to repay that portion of the total loss occasioned by the misconduct which was suffered by the government, which was required to close down the savings and loan. In this case, no such comparison is applicable. Here the drug forfeiture statute did not gauge the monetary assessment to any damage done the government. The government obtaining the forfeited property was not the sovereign investigating the case. In United States v $145,139 U.S. Currency, 18 F 3d 73 (CA 2, 1994) the government sought to forfeit the currency which the defendant had attempted to take out of the United States in violation of 31 USC 5316. Under this statutory scheme the government is allowed to take the instrumentality of the offense. Even though the currency is not contraband, it is subject to seizure as a means by which the remedial goals of the statutory scheme are satisfied. Congress apparently determined that it was inappropriate to put those funds back in the hands of the individual who has possessed the currency for fear that the offense conduct might be repeated. In short, neither of these cases evidence a conflict with respect to the specific statutory scheme at issue in this case. Because of the different statutory characteristics confronted in both of those cases, it is impossible to conclude that they conflict with the decision in this case.

The Sixth Circuit's application of the conclusion in Austin v United States, 509 U.S. ___, 125 L Ed 2d 488, 113 S Ct 2801 (1993) that forfeiture under 21 USC 881(a)(7) is punishment cannot reasonably be assailed and still be consistent with stare decisis. One need only ask whether the Sixth Circuit could have held that

forfeiture is not punishment to see the absurdity of the government's challenge to this prong of the Sixth Circuit's analysis. The conclusion in Austin that forfeiture under 21 USC 881(a)(7) is punishment was shared by six (6) members of the Court. The Sixth Circuit could not disregard this established precedent.

II.

The government also attacks the Sixth Circuit's conclusion that this Defendant was punished for the same offense by the imposition of both forfeiture and imprisonment. There is no question that the forfeiture complaint in this case was based on the same conduct for which he was indicted. While this similarity is not controlling, the criminal punishment imposed in this case involved the same statutory elements as the particular forfeiture. The statutory scheme compels this conclusion. To impose forfeiture the government claimed and offered to prove that the Respondent's real property was used to facilitate the growing of marijuana. To impose imprisonment, the government would have to show that the accused knowingly and intentionally grew marijuana.[3] The latter proposition is necessarily included in the first. With respect to both statutory schemes, the government would have to show that Respondent grew marijuana from his residence.[4]

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[3] In fact, the evidence presented at the criminal trial was that the Respondent started the growing process by nurturing seedling marijuana plants in his residence and later replanted them. At trial, this process was described in detail by the informant, Heather McPherson.

[4] In footnote 3, p. 12 of its Petition, the government indicates that the facts suggest that the forfeited real property was not the actual site of the growing marijuana and therefore the

The government argues that one could have property forfeited without showing that actual growing has occurred, claiming hypothetically that it is enough that the property was intended to be used for that purpose. This argument elevates form over substance. Absent a confession that one's property is going to be used to grow marijuana, the only method of demonstrating an intent to use the property is proof that someone engaged in conduct that would allow that intent to be inferred. Moreover, reliance on hypothetical bases for application of the double jeopardy protection has been thoroughly criticized as overly technical and not in keeping with the purposes behind the constitutional protection. See Justice White's opinion in United States v Dixon, 509 U.S. ___, 125 L Ed 2d 556, 592-594, 113 S Ct 2894 (1993).

In paragraph 5 of its Complaint for Forfeiture, the government claimed that the real property was used or intended to be used to facilitate the unlawful processing and distribution of marijuana, but then referred to the Affidavit in Support of Seizure Warrant as more fully setting forth its claim. That document fails to allege facts that show a mere intent to use. That document sets forth

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forfeiture and criminal prosecution are not the same offense. This claim is faulty in two respects. First, it focuses on the specific conduct involved in the case, an approach the government abhors when suggesting that under the forfeiture statute it is possible to merely intend to use the property illegally and have the property forfeited. Second, it ignores that fact the government alleged in the forfeiture complaint and offered proof at trial that the growing process started at Respondent's residence and that Respondent used his residence as a base of operations for nurturing the growing plants. Such evidence was essential for the government to establish a connection between the Respondent's home and the growing operation and to establish that Respondent knew about and grew the marijuana which was on adjoining real property.

facts designed to show that the property was actually used to grow marijuana. In any case, for the property to be forfeited the intended use could only have been shown by the conduct of the Respondent, i.e. his growing marijuana.

This portion of the government's argument urges an analysis and focus that is hypertechnical and formalistic. It defies the well established judicial approach to each case on its facts, and in the process, ignores the goals of the constitutional protection.

III.

The last reason Petitioner uses to persuade this Court to grant certiorari concerns the Sixth Circuit's determination that the simultaneous prosecution of the civil forfeiture and the criminal indictment, filed several months apart, were not the "same proceeding" for purposes of the Double Jeopardy Clause. Unlike its argument with respect to the "same offense", wherein Petitioner recommended a formalistic approach, the government now urges rejection of formalistic and technical considerations and instead, requests that this Court focus on the general purposes of the Double Jeopardy Clause. In effect, the Petitioner seeks to ignore reality. The government filed two separate proceedings in front of different judges prosecuted by different prosecutors. The Petitioner does not provide this Court with the principled formula that makes these proceedings the same for double jeopardy purposes. The fact that the Respondent knew that he could suffer both forfeiture and imprisonment does not make the proceedings the same

under any rational formulation of the rule and does not change the reality of the situation facing Respondent.

Petitioner's view ignores other abuses presented by the method of proceeding which characterized this case. The Double Jeopardy Clause is designed to prevent successive prosecutions for the same offense, not simply prevention of multiple punishments. While in this particular case the criminal trial proceeded[5], in subsequent cases where this peculiarity does not exist, the conduct of a trial itself would be subject to being barred. Additionally, a person whose property is subject to civil forfeiture is forced to make decisions which may affect his legal position during the criminal case. For example, while his exercise of the Fifth Amendment right to remain silent may not be used against him in a criminal case, it is a fact that can be used against him in the civil forfeiture case. Similarly, if he testifies during the forfeiture proceeding and makes any admissions, they can be used as substantive evidence in the criminal case. The financial resources needed to fight the criminal case may be depleted by a successful civil forfeiture prosecution. In short, it would be unfortunate to accept the conclusion of the dissenting judge in this case. In other words, in cases like this one, extending the protections of the Double Jeopardy Clause would depend on whether the government was satisfied with the outcome of the first proceeding. Persons who are able to determine that the government was dissatisfied with the

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[5] The Austin case was decided at about the time the trial in this case commenced. Respondent raised the double jeopardy issue after trial, but before sentencing.

outcome would be afforded protection, those who are not able to devine the government's state of mind would not.

IV.

The Petitioner's claim that the decision in this case limits the government's options should not be viewed with alarm. The government has been aware, at least since Austin and Halper that its method of proceeding in these cases has implicated the Double Jeopardy Clause. Other courts could grant the decision in this case only prospective effect. Moreover, the government has always possessed the option of proceeding in a single action including both the criminal offense and the forfeiture of the accused's property by invoking the provisions of the criminal forfeiture statute, 21 USC 853. The provisions of that statute are almost identical to those at issue in this case. Under §853 the government is entitled to forfeit the property of a person convicted of a statutory violation in which it was "used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of such violation". The government in this case elected to proceed under the civil forfeiture statute, knowing that procedure imposed increased costs, greater risks and increased pressure on the Respondent. That election succeeded in inducing him to enter into a consent judgment forfeiting the home he legitimately purchased. This is the kind of abuse that the Double Jeopardy Clause is designed to eliminate. The Sixth Circuit so found and its decision was appropriate.

CONCLUSION

The petition for writ of certiorari should be denied.

September 25, 1995

Respectfully submitted,

Lawrence J. Emery
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3401 E. Saginaw, Suite 104
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(517) 337-4866

AO 109 (2/90) Seizure Warrant ●

United States District Court

Eastern DISTRICT OF Michigan

In the Matter of the Seizure of
(Address or brief description of property or premises to be seized)

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES

LAWRENCE ZATKOFF

SEIZURE WARRANT

CASE NUMBER: 92X75843

TO: Agents of the Drug Enforcement Administration and any Authorized Officer of the United States

Affidavit(s) having been made before me by Christopher J. Hackbarth (Affiant) who has reason to believe that in the Eastern District of Michigan there is now certain property which is subject to forfeiture to the United States, namely (describe the property to be seized)

CERTAIN REAL PROPERTY LOCATED AT 1700 BRADEN ROAD, PERRY, SHIAWASSEE COUNTY, MICHIGAN, TOGETHER WITH ALL OF ITS FIXTURES, IMPROVEMENTS AND APPURTENANCES

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the property so described is subject to seizure and that grounds exist for the issuance of this seizure warrant.

YOU ARE HEREBY COMMANDED to seize within 10 days the property specified, serving this warrant and making the seizure (in the daytime—6:00 A.M. to 10:00 P.M.) (at any time in the day or night as I find reasonable cause has been established), leaving a copy of this warrant and receipt for the property seized, and prepare a written inventory of the property seized and promptly return this warrant to _____ (U.S. Judge or Magistrate) as required by law.

SEP 30 1992

Date and Time Issued

at Detroit, Michigan
City and State

MAGISTRATE JUDGE VIRGINIA MORGAN

Name and Title of Judicial Officer

Signature of Judicial Officer

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAWRENCE ZATKOFF

UNITED STATES OF AMERICA,

Plaintiff

Misc. No. 92X75843

vs.

CERTAIN REAL PROPERTY LOCATED AT
1700 BRADEN ROAD, PERRY, SHIAWASSEE
COUNTY, MICHIGAN, TOGETHER
WITH ALL OF ITS FIXTURES,
IMPROVEMENTS AND APPURTENANCES

Defendant.

_____/

AFFIDAVIT IN SUPPORT OF SEIZURE WARRANT

State of Michigan)
) ss
County of Shiawassee)

I, Christopher J. Hackbarth, being duly sworn state:

1. I am a duly appointed Special Agent of the U.S. Drug Enforcement Administration (DEA), having been employed as such since 1991.

2. By virtue of my employment with DEA, I perform various tasks which include:

A. Functioning as a surveillance agent observing and recording movements of persons suspected of trafficking in drugs.

B. Interviewing witnesses and informants relative to the illegal trafficking of drugs and the distribution of monetary assets derived from the illegal trafficking of drugs.

Appendix B

C. Investigating asset forfeiture relative to the persons property that was used or intended to be used to facilitate a drug violation.

3. I have participated in numerous domestic marijuana investigations from which I have learned:

A. That marijuana growers use specialized lighting systems to imitate sunlight. These lighting systems, in combination with electrical pumps, special exhaust vents to reduce heat and/or odor, and fans used to circulate carbon dioxide and oxygen substantially increase an indoor marijuana grower's electric cost.

B. That marijuana growers attempt to conceal the rooms or buildings used for growing. This frequently takes the form of blacking out all windows and/or sources of outside light.

C. That marijuana growers use chemicals to enhance growth, promote blooming and budding, and to regulate the acidity of the water for optimum growing conditions.

D. That marijuana growers may keep guns at the locations when they cultivate their marijuana to protect their operations.

E. That marijuana growers often start marijuana plants from seeds or seedlings indoors and transplant them outside as the spring growing season arrives.

F. That marijuana growers often plant the marijuana plants outdoors in areas away from their residence, and in a number of small plots so as not to bring suspicion upon the growers.

4. As part of my responsibilities, I was specifically assigned to aid in the investigation of Guy URSERY in the seizure regarding their use of real property located at 1700 Braden Road, Perry, Michigan, with reference to the manufacture and/or housing or facilitating of drug trafficking. This location is more particularly described as:

Part of the West 1/2 of the Northeast 1/4 of Section 32, Town 5 North, Range 3 East, Michigan, described as: Beginning at a point on the North line of Section 32 which is North 89 degrees 12 minutes 20 seconds East 669.82 feet from the North 1/4 corner of Section 32; thence continuing along said North line of Section North 89 degrees 12 minutes 20 seconds East 633.84 feet; thence South 01 degrees 46 minutes 55 seconds East 686.20 feet; thence South 89 degrees 12 minutes 20 seconds West 637.22 feet; thence North 01 degrees 30 minutes 00 seconds West 686.15 feet to the point of beginning. Subject to that part now used as Braden Road, so-called.

(Commonly known as 1700 Braden Road, Perry, Michigan)

5. As a result of reports made available to me from State law enforcement officers of the Michigan State Police and the Morrice, Michigan Police Department, I have learned the following:

6. Officer Chester Farrier of the Morrice, Michigan, Police Department has a reliable confidential informant, hereafter referred to as STATE-1. STATE-1 advised Officer Farrier that he/she is aware of a subject named Guy URSERY, whom STATE-1 has known for several years. STATE-1 told Officer Farrier that URSERY grows marijuana on his property every year by first starting seedlings indoors, and then transplanting them outside to let the plants grow to maturity.

7. The informant further advised Officer Farrier that some of the marijuana is dried by URSERY on a woodpile in URSERY's backyard and the marijuana is stored in a crawl space of the residence.

8. The informant further said that he/she could draw a map of the exact location of the growing marijuana.

9. Officer Farrier then brought this information to the attention of D/Lt. Mike Pifer, and D/Trpr. Tom Feahr of the Michigan State Police-East Lansing Criminal Investigations Team.

10. Trpr. Feahr personally verified through Michigan Secretary of State driver and vehicle records, that a Guy URSERY showed to reside at 1700 Braden Road, Perry, Michigan.

11. Trpr. Feahr and Officer Farrier then, using a map drawn by STATE-1, drove by URSERY's residence and saw that the map closely resembled the residence and the surrounding area. They then used the map to locate three outdoor marijuana growing plots on URSERY's property. Two of the plots contained at least nine growing marijuana plants each, while the third contained at least twenty-five plants. Trpr. Feahr seized one growing marijuana plant from one of the plots and both officers left.

12. Trpr. Feahr then had a laboratory exam performed on the marijuana plant, and it was found to be marijuana.

13. Based on the above information, Trpr. Feahr obtained a search warrant from the Shiawassee County Prosecutor's Office on July 29, 1992. The warrant was signed by Magistrate Barnes.

14. On July 30, 1992, members of the Michigan State Police executed the search warrant at 1700 Braden Road, Perry, Michigan. The three outdoor grow plots which had been found by Trpr. Feahr earlier were located, as well as three additional outdoor grow plots. Numeric seeds, stems and other marijuana plant material was also found inside the residence, as documented below:

A. two (2) brown paper sacks, containing 34 clear plastic baggies, each baggie containing a quantity of green plant stems and seeds, later found to be marijuana, retrieved from the right side, middle drawer of the desk in bedroom No. 1.

B. one (1) brown pill bottle in the name of Sandra Cain containing suspected marijuana seeds, retrieved from the right side, middle drawer of the desk in bedroom No. 1.

C. one (1) Reebok shoe box with ten (10) clear plastic baggies, each containing suspected marijuana seeds. The box also contained loose seeds. Item was retrieved from shelf of closet in bedroom No. 1.

D. a quantity of marijuana plant stalks and stems, found in the crawl space of the residence.

E. two (2) clear plastic baggies with suspected marijuana seeds inside, retrieved from the closet of the radio room.

F. a one (1) pound box of Ortho general purpose plant food found on a workbench in the garage.

G. one (1) Mossberg 12 gauge shotgun, model 600AB, serial #C80054, found loaded in bedroom No. 1.

H. twenty-four (24) marijuana plants from grow plot #1.

I. thirty-three (33) marijuana plants from grow plot #2.

J. fourteen (14) marijuana plants from grow plot #3.

K. ten (10) marijuana plants from grow plot #4.

L. forty-nine (49) marijuana plants from grow plot #5.

M. twelve (12) marijuana plants from grow plot #6.

N. one (1) Sylvania grow light, a "Gro-Lux" catalog, #GL-1302, a two foot fixture and bulb, and two aluminum support brackets, all found in a box.

O. three (3) clear plastic baggies containing green plant stems and seeds, and a pill bottle in the name of Guy URSERY with a partially burnt hand rolled cigarette inside, found in the upper left desk drawer in bedroom No. 1.

The above drug exhibits were sent to the Michigan State Police Crime Lab for analysis. This analysis indicated the above substances were in fact marijuana.

15. A real property title ownership and encumbrance search for the real property located at 1700 Braden Road, Perry, Michigan revealed a Warranty Deed, dated July 15, 1988 between Rosalio De La Garza and Linda Marie De La Garza, his wife (as sellers) and Guy URSERY and Cynthia K. URSERY, his wife (as buyers) for said property, reflecting the consideration of $19,900.00. The title search further revealed a Mortgage, dated May 2, 1989 between Guy J. URSERY and Cynthia K. URSERY and NBD Mortgage Company for 1700 Braden Road, reflecting the principal sum of $41,000.00. The State Equalized Value (SEV) for the above property is $32,550.00.

Wherefore, based on the above presented facts, the affiant asserts that there is probable cause to believe that the above described parcel of real property is subject to seizure and forfeitable as set forth in Title 21 U.S.C. 881(a)(7).

Dated: _____

Special Agent Christopher Hackbarth
Drug Enforcement Administration

Subscribed and sworn
to before me this
___day of 1992

SEP 30 1992

VIRGINIA M. MORGAN
United States Magistrate Judge

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
By [signature]
DEPUTY CLERK

FILE
Usag - Pleading

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA	)	
	)	**PRESENTENCE INVESTIGATION REPORT**
vs.	)	
	)	**Docket No. 93-CR-50016-FL-01**
GUY JEROME URSERY	)	

Prepared For:	The Honorable Avern Cohn United States District Judge
Prepared By:	Joseph B. Herd United States Probation Officer (313) 766-5163
Assistant U.S. Attorney Marlene Dayne 210 Federal Building 600 Church St. Flint, Michigan 48502 (313) 766-5177	Defense Counsel (Retained) Lawrence Emery 3401 E. Saginaw, Suite 104 Lansing, Michigan 48912 (517) 337-4866
Sentence Date:	Unknown
Offense:	Count 1: 21 U.S.C.§ 841(a)(1), Manufacture of Marijuana, a Class B Felony, 5-40 years and/or a $2,000,000.00 fine, with at least four years supervised release, plus a special assessment fee of $50.00.
Release Status:	On June 16, 1993, the defendant was released on a $10,000.00 unsecured bond.
Detainers:	None
Codefendants:	None
Related Cases:	None
Date Report Prepared:	8/4/93 Date Report Revised:

Identifying Data:

Date of Birth:	8-4-56
Age:	37
Race:	White
Sex:	Male
SSN No:	363-64-7660
FBI No:	986610RA3
USM No:	Not returned
Other ID No:	U-626-291-402-610 (M.D.L.#)
Education:	GED
Dependents:	One
Citizenship:	United States
Legal Address:	1700 Braden Road Perry, Michigan 48872
Aliases:	Jerry

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. On February 5, 1993, a federal Indictment was entered in the Eastern District of Michigan charging GUY JEROME URSERY with Count 1, Manufacturing of Marijuana, in violation of 21 U.S.C. § 841(a)(1) on or about July 30, 1992.

2. On March 1, 1993, the defendant made an initial appearance before U. S. Magistrate Judge Marc L. Goldman. Judge Goldman set a $10,000.00 unsecured bond. Arraignment was held at the same time and the defendant entered a plea of not guilty.

3. On June 16, 1993, the Honorable Stewart A. Newblatt granted a motion to modify the bond as to the defendant. An unsecured bond was set in the amount of $10,000.00.

4. On June 25, 1993, there was an order by the Honorable Stewart A. Newblatt reassigning the case to the Honorable Avern Cohn for the purpose of conducting trial proceedings and any other related matters.

5. On June 30, 1993, a criminal jury trial began before the Honorable Avern Cohn.

6. On July 2, 1993, the jury found GUY JEROME URSERY guilty of Count 1, Manufacturing of Marijuana, in violation of 21 U.S.C. § 841(a)(1) on or about July 30, 1992.

7. Pretrial Services reports that the defendant has been cooperative and has followed all conditions of his supervision. Urinalysis conducted by Pretrial Services and the Probation Department have returned negative for illicit drugs.

The Offense Conduct

8. Information in this section was obtained from records supplied by the Michigan State Police. The defendant was asked to submit a version of the offense in writing but declined.

9. The Michigan State Police were contacted by the Morrice, Michigan Police Department July 27, 1992. The Morrice Police Department said that they had an informant providing information to them regarding a marijuana growing operation by a person named GUY URSERY, and requested assistance developing the case.

10. The informant told Morrice Police that the defendant grows marijuana on his property by starting the plants as seedlings indoors and then transplants them outside to allow the

plants to grow to maturity. Some of the marijuana is then dried on a woodpile in MR. URSERY'S back yard and the marijuana is stored in the crawl space of the residence.

11. The informant advised Morrice police that the defendant keeps numerous weapons inside the residence and has threatened to shoot anyone on his property.

12. On July 27, 1992, a Morrice police officer and a Michigan State Police officer drove to the URSERY residence. They walked onto the property and were able to locate three suspected marijuana plots by using a map supplied by the informant.

13. Two of the plots each contained at least nine plants, while one plot contained at least 25 plants. One plant was seized from a plot and the officers vacated the area.

14. On July 28, 1992, a Michigan State Police Laboratory expert verified that the plant taken from the residence was marijuana.

15. A search warrant was requested and authorized by the Shiawassee County Prosecutor's Office on July 29, 1992. On July 30, 1992, the Michigan State Police Emergency Support Team served a warrant at the URSERY residence. The only person in the house at the time of the raid was the defendant's wife, Cynthia K. Ursery.

16. Seized during the search was one Remington .22 caliber rifle, with one Bushnell .22 caliber scope. This gun, which had a broken stock, was loaded and stood against the door wall in the kitchen; one Mossberg .12 gauge loaded shotgun was standing in a bedroom. In the same room were a total of 44 clear plastic baggies, each containing a quantity of green plant stems and seeds; and one brown pill bottle containing seeds. Also seized were 142 marijuana plants from six plots in the yard, one Sylvania grow light, and support apparatus was found hanging from the ceiling in the crawl space.

Summaries of Drug Quantities Used to Compute Offense Level

	Date	Amount	Source	Page/Par.
17.	7/30/92	142 marijuana plants	Seizure/ lab report	Pg. 4/ Par.16

18. The 142 marijuana plants seized from MR. URSERY'S residence on July 30, 1992, are being used to compute the guidelines.

Victim Impact

19. There are no identifiable victims in this case.

Adjustment for Obstruction of Justice

20. There is no information to suggest that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

21. The defendant was found guilty of the offense by a jury. He chose to remain silent about his role in the offense and therefore, will not receive any adjustment for acceptance of responsibility.

Offense Level Computations

22. The November 1, 1992 edition of the Guidelines Manual has been used in this case.

Count 1 - Manufacture of Marijuana

23. Base Offense Level: The base offense level for a violation of 21 U.S.C. § 841(a)(1) is located at Section 2D1.1(a)(3), which references the Drug Quantity Table, Section 2D1.1(c)(9). An offense level of 28 is required for distribution of at least 100, but less than 400 kilograms of marijuana. +28

24. Specific Offense Characteristics: The defendant was in possession of two firearms, which were in close proximity to the marijuana stored in the home. Pursuant to 2D1.1(b)(1), the offense level will be increased by two points. +2

25. Victim Related Adjustment: None. 0

26. Adjustment for Role in the Offense: None. 0

27. Adjustment for Obstruction of Justice: None. 0

28. Adjusted Offense Level (Subtotal): 30

29. Adjustment for Acceptance of Responsibility: None. 0

30. Total Offense Level: 30

31. Chapter Four Enhancements: None. 0

32. **Total Offense Level:** 30

PART B. THE DEFENDANT'S CRIMINAL HISTORY

Adult Criminal Convictions

33. None.

Criminal History Computation

34. MR. URSERY has no criminal history points. According to the Sentencing Table in Chapter 5, this places the defendant in a criminal history category of I.

Other Criminal Conduct

35. None.

Pending Charges

36. None.

Other Arrests

37. None.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

38. GUY JEROME URSERY was born to Guy and Elizabeth Ursery (nee: Seely) on August 4, 1956, in Flint, Michigan. The defendant was the third of four children and the only male born to the couple. His siblings are Patricia June Larner, age 42, a housewife in Greenville, Michigan; Michelle Melinda Rushton, age 39, whereabouts unknown; and Anita Jo Townes, a shoe factory worker in Greenville, Michigan.

39. The defendant's family moved several times during his youth. All moves were either in the city of Flint or within approximately 20 miles of Flint.

40. Guy and Elizabeth Ursery divorced when the defendant was in the eighth grade. According to MR. URSERY, the divorce occurred because his father was an alcoholic. At the time of the divorce, MR. URSERY went to live with his father, and his sisters remained with his mother. The defendant soon moved to the home of his mother, as his father's drinking problem did not allow him to properly care for the defendant. MR. URSERY lived primarily at the home of his mother until the age of 16.

41. The defendant married his high school sweetheart, Cynthia Kay, on August 5, 1972, in Flint, Michigan. The couple remain married. They have one son, Brian Michael Ursery, age 20. He lives with his maternal grandparents in Flint Township.

Physical Condition

42. The defendant is 5'10" tall and weighs approximately 188 pounds. He has brown hair and hazel eyes. He has two tattoos on his left forearm, "Cindy" and "Love CR."

43. MR. URSERY was involved in a motorcycle accident on September 14, 1985, in which he hit a car head-on. His pelvic bone was broken. Verification is pending from McLaren Hospital in Flint.

44. MR. URSERY brought in a physician's note stating that he has had chronic bronchial asthma and allergies that requires medication. The note also states that the defendant has bi-lateral carpel tunnel syndrome which was caused by the defendant's work at General Motors.

Mental and Emotional Health

45. The defendant stated that he does not have a history of mental or emotional problems. He did say, however, that he is under a great deal of stress because of his current involvement in the legal system.

Substance Abuse

46. The defendant began using marijuana at the age of 14. He said he infrequently used the drug throughout his teen and early adult years. At the time of his arrest, MR. URSERY admits that he was smoking marijuana approximately two times per week. He said his last use was October 1, 1992. The defendant has never been involved in a drug treatment program.

Education and Vocational Skills

47. MR. URSERY dropped out of the tenth grade at Carman High School in 1972 to marry. He obtained his GED in 1991 from the Carman-Ainsworth District through a program sponsored by General Motors. He also completed a technical skills advancement course and passed a skilled trades test for General Motors. He is currently on the waiting list for the positions of pipe fitter, machine repair, or millwright.

Employment Record

48. The defendant is currently employed at the General Motors Truck and Bus Plant in Flint, Michigan. His position was that of an arc welder and he earns $520.00 a week. The defendant began his employment at General Motors August 4, 1977.

49. From July of 1984 to July of 1985, MR. URSERY worked at Lake Orion Cadillac. His position was that of electrical repairman on Cadillacs and Oldsmobiles.

50. From July of 1982 to July of 1984, the defendant worked for National Roofing in Flint. His position was that of a hot tar roofer and he earned approximately $150.00 per week.

51. From April of 1974 to June of 1979, the defendant worked for Fireball Rentals in Davison, Michigan. His position was that of a hot tar roofer and he earned approximately $150.00 per week.

Financial Condition: Ability to Pay

52. The defendant submitted a signed financial statement and accompanying documentation supporting the following financial profile:

Assets

Bank Accounts

National Bank of Detroit (checking)	$ 12.19

Unencumbered Assets

1986 GMC Jimmy S-15	$ 4,500.00

Equity in Other Assets

Residence at 1700 Braden Rd., Perry, MI	$ 9,000.00
TOTAL ASSETS	$13,512.19
Unsecured Debts	-0-
Net Worth	$13,512.19

Monthly Net Income

Net salary	$ 2,100.00

Monthly Necessary Living Expenses

Mortgage	$ 751.75
Electric	80.00
Heating oil/gas	35.00
Telephone	80.00
Groceries/supplies	450.00
Auto insurance	75.00
Transportation	100.00
Clothing	100.00
TOTAL NECESSARY EXPENSES	$ 1,671.75
Net Monthly Cash Flow	$ 428.25

PART D. SENTENCING OPTIONS

Custody

STATUTORY PROVISIONS:

53. The minimum and maximum terms of imprisonment for this offense are 5 to 40 years, pursuant to 21 U.S.C. § 841(b)(1)(B).

GUIDELINE PROVISIONS:

54. Based on a total offense level of 30 and a criminal history category of I, the guideline range is 97 to 121 months.

Impact of Plea Agreement

55. There was no plea agreement in this case as the defendant was found guilty by a jury.

Supervised Release

STATUTORY PROVISIONS:

56. 21 U.S.C. 841(b)(1)(B) requires a supervised release term of at least four years.

GUIDELINE PROVISIONS:

57. At least four years, pursuant to the statute.

Probation

STATUTORY PROVISIONS:

58. The defendant is not eligible for probation under the statute or the guidelines.

Fines

STATUTORY PROVISIONS:

59. The maximum fine amount in this case is $2,000,000.00, pursuant to 21 U.S.C. § 841(b)(1)(B).

60. A special assessment fee of $50.00 must be imposed, pursuant to 18 U.S.C. § 3013.

GUIDELINE PROVISIONS:

61. The fine range for this offense is $15,000.00 to $2,000,000.00, pursuant to 5E1.2(c)(3) and 5E1.2(c)(4).

62. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release. The most recent advisory from the Administrative Office of the United States Courts suggests that a monthly cost of $1,734.00 be used for imprisonment, $180.90 for supervision, and $1,132.00 for community confinement.

Restitution

63. The Victim and Witness Protection Act does not apply to Title 21 offenses. Therefore, restitution is not applicable in this case.

Denial of Federal Benefits

STATUTORY PROVISIONS:

64. For individuals convicted of an offense occurring on or after September 1, 1989, the Court may order that the defendant will be ineligible for certain federal benefits. Since this offense occurred after September 1, 1989, the denial of federal benefits may be considered. The length of such ineligibility may range from one year for Possession of Controlled Substances, to five years for a first conviction for Distribution.

GUIDELINE PROVISIONS:

65. According to Section 5F1.6 of the Guidelines Manual, the denial of federal benefits is a sentencing option for drug offenses.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

66. None.

Respectfully submitted,

Raymond L. Frank, Jr.
Chief U.S. Probation Officer

by Joseph B. Herd
Joseph B. Herd
U. S. Probation Officer

Reviewed and Approved:

Fred S. Tryles
Fred S. Tryles, Supervising
U. S. Probation Officer